V

The Return of the "War Crimes"-- "War Criminals" Issue

"The Second World War was prosecuted by the United Nations against Germany long after an equivocal patched-up armistice was possible. Impatience for the end of the war was not allowed to prevent the Allies from continuing until they had won a real and lasting victory." Trygve Lie (first secretary general of the United Nations, 1946-1953), "A World of Patience," *New Republic*, October 28, 1946, pp. 539-540.

"The Nürnberg court is a political court with a political job to perform." Editorial, *Nation*, October 27, 1945, p. 418.

"Where there is a free press and academic freedom to teach history honestly, politically tainted trials tend to enshrine not the State's evidence, however interesting, but rather the prisoner, however unpopular at first." Editorial, "The Nürnberg Confusion," *Fortune*, December, 1946, p. 120.

In recent months, particularly between the summer of 1965 and the spring of 1966, America's press, radio, and television have been deluged with loud and angry complaints over the "war criminal" designation of captured United States military personnel by North Vietnamese, and the threat of their "trial" and execution. A few murders of this kind have actually been carried out. All such pro-

ceedings have been denounced as "farces" and "war crimes" in turn, and in truth they do not approach legal proceedings by the wildest stretch of the imagination. But an entire generation of Americans has reached voting and fighting age with only the muddiest notion of what the whole affair is all about. Anyone even faintly acquainted with the process of Anglo-Saxon legal action indignantly repudiates such summary preliminaries to murder, but he gets little or no help from his own sources of information as to what a "war criminal" correctly is, and how such persons are to be recognized in the first place. The only obvious criterion seems to be that it is always someone among the enemy; one's own martial colleagues never commit a "war crime."

Before examining the problem within the limits imposed by the rules and verbiage of Mars, it is appropriate to observe that it was an unfortunate moment when the warriors and their civilian "statesmen" superiors began to indulge themselves in language inviting moral comparisons. For a long time there was no attempt to exploit any particular phase of the lengthy catalog of death and destruction, and the means whereby they were brought about, in warfare. While combatants could prosecute the mutual struggle with any and all devices and implements at their disposal, and press advantages with the same detachment exhibited by a housewife pouring a teakettle of boiling water on an ant-hill, there at least was the consolation of not encouraging the analysis of social, moral, and ethical critics. (It should be pointed out, however, that during the time of the feudal wars, churchmen sought to establish the immunity of even combatants who sought the refuge of a church, as well as sanctioning fighting only on certain days of the week, an idea which seems to have been revived, at least in principle, in the current war in Viet Nam, what with occasional cease-fires and postponements to facilitate the celebration of various holidays.) However, the fatal flaw in the effort to capitalize by way of propaganda maneuver was the invocation of the terminology of law, and the fabrication of the synthetic "war crime." Once this gate opened, warfare lost forever the possibility of being exempt from examination in the same way individual behavior has been scrutinized since the so-called "dawn of conscience."

For, of all the criminal institutions and procedures invented by the human race over the millennia since the Neolithic Age, by far

the one of first magnitude is war. As the Crime of Crimes, it has enjoyed a degree of relative immunity from moral and ethical condemnation unshared by any of its relatives.[1] Over the years it has served as the cloak for the perpetration of acts under the auspices of the collective herd which have been condemned and made serious crimes by nearly all peoples when committed by individuals. The anonymous herdist quality of war has served as a disguise for the violation of the last six of the Ten Commandments on a scale so towering as might cause even the mechanism of the most advanced computer to waver trying to compile them. Though killing, robbing, and raping are ferociously denounced and punished within the specific community, it has long been considered quite proper to engage in all these activities as long as they are inflicted on the persons of strangers, preferably a long distance from home and unknown to the perpetrators.

The only thing more repulsive than these crimes is the mountain of print and the billions of spoken words employed to justify them over the centuries, a nauseating literary and oral tradition most frequently engaged in by the very same people who wring their hands over crime in their own vicinity and profess to be prostrated by its existence. And thanks to the evolution of the mass national State and communications technology, these grand adventures in crime are generally masked by all involved, in turn, as expeditions in the advancement of moral and ethical purity of blinding whiteness and ineffable scope. The lust and greed for the land and possessions of the other, the anticipation of the power resulting from such acquisitions, and the slaking of hatred by means of the murder of the antagonists themselves? If such subjects ever are brought out into the open, they are exclusively ascribed only to the opposition. And over all is cast the cloak of anonymity through mob action, probably the most comforting comcomitant of all. The escape from the indictment of individual responsibility is of first-rank importance, otherwise the residues of the received moral and religious values and taboos would limit the prosecution of these country-wide criminal essays by exercising restraining inhibitions on the behavior of the individual participants. Once these barriers have been breached,

[1]The literature attacking war as a criminal enterprise is neither sparse nor of just recent vintage. But it has grown substantially in the last century; one might compile a stunning bibliography beginning with the noted Argentine writer Juan Bautista Alberdi's *El Crimen de la Guerra (The Crime of War)*, published in Buenos Aires in 1870.

indeed, it becomes a situation where "the sky is the limit."

It is impossible to make a full analysis of the pressures and forces which make war attractive and exciting even to the vast number of those who gain little if anything from its conduct, and who most often are the ones who lose their lives during its transpiration. One will find excuses ranging from the desire to escape the prosaic and "boring" realities of "peace," to possession by a powerful urge to satisfy irrational appetites. With the wondrous growth of mass communication there is a new element in the form of induced synthetic hatred manufactured by specialists and distributed among the populace in generous quantities. In addition, ferocity toward those in distant lands may serve as a substitute for that which might be incubated toward those near at hand.

Though the invention of conscription has brought on to the battlefield a multitude who have no heart for martial enterprise at all (professional soldiers have concluded on a number of occasions that one out of every two conscripts on the line of fire refuses to aim or is incapable of aiming his weapon at an enemy's person), the criminal content of war has steadily risen in the era of the forced-military-service democratic national State. And the devices of national patriotism in all lands encourage the veneration by the citizenry of those who have been unstinting in sacrificing the lives of their ancestors in warfare.[2] It has been remarked that the masses everywhere most dearly love those who have been the most proficient in getting them killed.[3] This is made all the more dramatic in view of the invention of totalitarian strategic warfare and its prosecution far behind the battle lines against the women, children, the old, sick, and non-combatants of all descriptions.

It is puzzling, therefore, that as warmakers in this century have effectively obliterated the distinction between combatants and non-combatants, have made war become more herdlike and impersonal

[2]One is reminded of the grim observation of William L. White: "Very few of those who maintain that it is sweet to die for one's country have ever done it." White, "The Dying and the Buying," *Saturday Evening Post* (October 18, 1941), p. 9. White, the son of the famous Kansas editor William Allen White, and then a roving editor for the *Reader's Digest*, later became famous as a writer of wartime best sellers, *They Were Expendable, Journey for Margaret, Queens Die Proudly*, and *These Are the Russians.*

[3]"So runs the love of nations
As old men specify
The fitful love of nations,
For which the young men die."—"EBW," "Love Among the Foreign Offices," *New Yorker* (February 1, 1947), p. 24.

than ever before, and have fought it on an ever-rising curve of ferocity and destructiveness, they should make a sickening invocation of the principle of personal responsibility in seeking to fasten upon their defeated counterparts the full blame for the hostilities and some of the things that went on during them, once the gunfire has terminated in "victory." (The immense destructiveness of and loss of life in modern industrial war also suggest a frightening expansion of the irrational component now present in such conflicts. The economic historian Fred Shannon concluded that since it cost the United States more to fight World War Two than the total value at the beginning of hostilities of all the real and personal property of its defeated enemies combined, it would have been cheaper to buy out these lands rather than fight with them. This indicates the degree to which the economic aspect involved in war has been altered. Instead of the goal of the occupation and use of his productive land and the immediate enjoyment of the enemy's personal property [now mainly confined to the looting or "liberation" of personal items as souvenirs by the soldiers], the long-range aim appears to be control over productive properties, working forces, markets, and other capital, as well as giving the economy of the victor's State, more and more collectivized and centrally-controlled as a result of the pressures of war, an excuse for subsequent dynamism in providing for war damage repair and additional enlargement of "defense," which also extends and enhances power tenure.)

In returning to the theme of "war criminals," the term which has been used for over a quarter of a century to designate specific persons as more criminal than others in the welter of murder, theft, rape, and destruction which encompasses everyone in war,[4] we are faced with a complex subject. "War crimes" seem to consist of two classes of offenses. The first is obviously political, and relates to the

[4]The subject of atrocities in the Second World War is almost entirely a one-sided story to this day. A brief, preliminary commentary on American atrocities by Edgar L. Jones early in 1946 ("One War Is Enough," *Atlantic Monthly* [February, 1946], pp. 48-53) drew an angry, outraged reaction from the readers. This prompted Jones to comment, "I cannot blame the home front for being shocked, because censorship regulations during the war banned any mention of our own acts of bestiality, but anyone who knows war will assure the ivory-towered unbelievers that there is little room for Christian integrity in battle. The issue is not what Americans or any other troops did, but what the war did to them." Jones, rejoinder in "Atlantic Repartee," *Atlantic Monthly* (April, 1946), p. 31. Two other contemporary items of some interest are Jan Valtin, *Children of Yesterday* (New York: Reader's Press, 1946) and Austin J. App, *History's Most Terrifying Peace* (San Antonio, Texas, 1946).

alleged responsibility of certain persons for "starting" a given war, usually designated as "aggression." There is an absolute absence of agreement on the meaning of "aggression" when used in the verbiage of statecraft, and no efforts to define it to the satisfaction of any significant part of the world have ever come even close to success. But this has not inhibited its subjective application by an almost numberless multitude of politicians and propagandists to acts of others with whom they have a conflict of interest. Effectiveness in making the charge stick, however, depends on unlimited success in battle; only when one has his hands on the defeated can he possibly go through the motions of instituting court proceedings to "try" these predesignated "war criminals." It has never been known throughout history for a victorious war power to admit to any responsibility for the precipitation of hostilities. Therefore, the outcome of any "trial" for "war crimes" of this type is predictable on the part of almost anyone above the level of an imbecile; it is a more sophisticated and hypocritical way of annihilating the losers for the crime of having lost.

The class of "war crimes" which has drawn the attention of the people in the last nine months is of the second rank: presumably insufferable acts perpetrated by actual combat forces after the war has gotten under way. It takes a particular kind of mind to be able to distinguish, within this immense Crime, that there is a range of variable criminality among these offenses. Thus, for instance, shooting or stabbing to death a woman or child in the immediate combat zone may be designated as a "war crime" by one side but not the other, while the burning to death of a woman or child with a jellied gasoline bomb 1,000 miles from the combat zone may similarly be viewed by each of the contesting forces, in turn, as a "war crime" or a successful sortie of strategic warfare. Therefore, "war crimes" proceedings for this class of offense, unless there has been a knockout victory, rapidly descend to the level of crude mutual reprisals upon each side's helpless personnel, a particularly savage type of crime itself.

Again, only if one side is completely at the mercy of the other can a genuine "war criminal" proceedings be carried out, and with the usual foreseeable denouement. But the result will hardly be of a moral order superior to that following any tribal clash of Stone Age people, after which the living vanquished are all massacred. These people deserve the nod, actually, in that they make no recourse to

the hypocritical balderdash of pretending to be putting their powerless enemy through a legal process prior to putting them to death. The effort to add dignity to these preposterous proceedings by presuming that there are "rules of civilized warfare" which contestants are bound to be governed by, violation of which being the grounds for indictment as a "war criminal," is mainly an essay in unintentional black humor. As if there were any more reprehensibility involved in killing a soldier with poison gas, flame throwers, or exploding bullets than there is in killing his wife and children by imposing a food blockade on his homeland or incinerating them by incendiary bombs dropped on their home, a thousand miles from the scene of combat. (Is there really any distinction between being done in with a pocket-knife and being converted into ashes by an atom bomb? By what kind of obtuseness must one be possessed to engage in long, tedious, hair-splitting discourses on the alleged vast, galactic differences between such fates?)

Even more engrossing than the incredible arguments over the degrees of criminality involved in the methods employed for killing people of various official and unofficial states and dress are the tortured, uneasy discourses of theologians on the abyss which separates the act of murdering a neighbor, relative, or intimate as compared to the slaughter of a total stranger in a distant land against whom one has no personal grievance whatever.

No introductory discussion of the subject of "war crimes" would be satisfactory without attention to that one known as "genocide," the neologism of the jurist Raphael Lemkin in 1943, now entered in our dictionaries (*American College Dictionary*: "Extermination of a national or racial group as a planned move"). This introduces a peculiar distinction in the area of mass murder, in addition to imposing the difficulty of proving such action as a product of conscious planning, namely, the apparent sanction of such exterminations as long as they are unplanned. As such, "genocide" has been with us for a long time, and again, we have no record of a victorious force or State undergoing prosecution for this "war crime." On the other hand, devious juristic legerdemain could be employed at the conclusion of all wars by the winners to lay this charge upon the defeated, and a specious though attractive case could easily be presented for approval by the populace representing the land of the victors. After all, if the leaders of a war believe that winning is impossible without planning to kill all the enemy, then they are obvi-

ously promoting "genocide." There is every likelihood that there will be as ugly a backfire some day on the issue of "genocide" as there has already been and will continue to be on the matter of other "war crimes" and "war criminals."

In essence, however, "war crimes" trials are political spectacles, and are basically continuations of the war after formal hostilities have ceased. Though draped with the toggeries of legality, the most repulsive aspect of them all, they are intended to perform in not much different manner from the guns which did the speaking until shortly before these "trials" began. The sating of vengeance against the persons of prominent antagonists who survived the war is an obvious objective. Cowing the survivors of these "trials," that they will be amenable to the most crushing impositions of the victors shortly, is another; these tribunals represent, if nothing else at all, *total power*, subject to no review or appeal whatever. The supreme mockery perhaps is the immunity of the prosecutors and judges from the "law" they are enforcing upon the preconvicted "war criminals." (In a stage trial of this sort, the court is seeking to find out not if the accused are guilty or not, but *how* guilty, for the purposes of being able shortly thereafter to make political capital out of the event, emphasizing in tones of fake horror how unspeakable the condemned are, which in turn is presumed to release the conquerors from all restraint and permit any savagery to be visited upon the persons of the condemned as proper punishment.[5]

There is still another objective of such "trials," in the classic sense, which the English observer F.J.P. Veale has referred to as "political biology." In this case, action proceeds almost devoid of emotion, and takes place with the same aplomb and objectivity which prevails when one is culling over vegetables for a stew. The situation is simply this: the new political dispensation that is to rise on the rubble of the just-concluded war is one which must make use of some of the defeated, preferably the thoroughly terrified, the venal, and those who change "principles" and ideologies in the

[5]The writer John Dos Passos, in an article written for *Life* early in 1946 on his impressions of defeated and occupied Germany, quoted a U.S. Army lieutenant "of Jewish faith" who understood explicitly the operational consequences of the mandate of total power: " 'I've been interrogating German officers for the War Crimes Commission and when I find them half-starved to death right in our own PW [prisoner of war] cages and being treated like you wouldn't treat a dog, I ask myself some questions. All these directives about don't coddle the Germans have thrown open the gate for every criminal tendency we've got in us.' " Dos Passos, "Report on the Occupation," *Life* (March 11, 1946), p. 118.

same manner and with the same regularity that they change shirts. There will be an irreducible remnant of the late adversary, however, which cannot, for a variety of reasons, be considered as proper recruits for the New Order. They may have been too vigorous in their resistance, they may be stubbornly unwilling to change their views, they may refuse to work under the new "leadership." For these and possibly several other reasons, such persons are utterly out of consideration. And, being resourceful, intelligent, and possibly implacable, allowing them to remain in the "body politic" is akin to permitting dangerous disease carriers to remain at large in the community. Therefore, they must be excised, not necessarily because their executioners hold high personal animus toward them, but simply because *they* cannot by any stretch of their imagination be envisioned as subordinate partners in the next regime. And at the same time, the disposing of such individuals is an act of political decapitation, depriving the remnant of the vanquished of any possible leadership cadre of top rank and previous prestige.

It is obvious that simple summary execution upon capture is the easiest method of handling this problem. But there is believed to be an additional political advantage to be gained by keeping them alive, stripping them of their official dress, forcing them to don shabby clothes and subsist on poor food, incarcerating them under conditions forced upon only the most brutal and degraded law violators, and then shaming them before the world in a big propaganda extravaganza, preferably billed as creatures almost of a subhuman order, before finding "legal" grounds justifying their ceremonial murder. Nothing better pin-pointing such "trials" as political floor shows is the nature of the indictment. Those on trial are rarely if ever charged with *individually doing* anything, the very essence of legal process. Invariably, the issue involved is their responsibility in a generalized way growing out of their previous high positions. Of course, there are subsequent "trials" for those of lesser rank, down virtually to those employed as servants, maids, and kitchen help. There may be a greater degree of insistence in the case of the less highly-placed on their personal guilt, and in no case are such accused allowed to enter a plea of having followed orders from higher authority. Two sets of standards prevail during these "trials," and it is rarely illustrated better than when such matters are on the agenda. Though the victors sitting in judgment punish defiance of orders from superiors swiftly and drastically, the con-

viction they seek to impress upon those they are trying as "war criminals" is that they should have listened to the Higher Law instead of that of *their* superiors, presumably their personal conscience, and refused to carry out the order which supposedly resulted in the "crime" for which they are being tried. Neglecting for a moment the prodigious hypocrisy of the judges, this is a dangerous doctrine for all concerned, judges and judged alike. Sustained insistence upon the principle of individual responsibility and the subordination of authority to the Higher Law of individual conscience, as a universal constant, might easily undermine and make unworkable all statecraft built upon conscripted and otherwise impressed and dragooned military force. There would be the strong threat that such elements might disregard the hyperbole and the hyperthyroid gasconade of the propaganda departments and "vote with their feet" (as Lenin described the behavior of Russian armies in 1917) against further participation, and such mass desertion would be absolutely impossible to cope with. Even the ferocious Clemenceau, who had one out of every ten Frenchmen shot at random in units of their army infected with mutiny, disaffection, and desertion in the First World War, would have been in a grave predicament in a putative situation comparable to that described above. One may conclude, however, that insistence on individual moral culpability will invariably be confined for export to one's enemies, as well as for keeping in reserve for invocation at possible "war crimes" trials.

Absolutely essential to a really effective "war crimes" trial is a psychical atmosphere brought to as near incandescence as possible by a hate campaign. This is quite out of the question if the contest among warriors is not fairly long-drawn-out, even though remarkable achievements of this kind are possible even in short encounters. The hate propaganda against the Germans in the U.S.A. in the short year and a half of participation in World War I reached a breathtaking peak, and its main themes have never disappeared. They were enlisted all over again for World War II, and combined with many new ingredients to make a product which shows little sign of abatement, even now, over twenty years since that war ended and since the Germans were enrolled in the American camp. The aura of hate built up by every means available as a prelude to the "war crimes" trials of Nuremberg, Manila, and Tokyo of 1945-46 is in a class all by itself in modern times, and made possible a public

temper of permissiveness and a remarkable lack of disagreement in which everything previously cited above went through with effortless efficiency. In the midst of the sweet twittering of public communications media on the subject at that time, one was able to detect few if any harsh bellows of disapproval, and the effect of such as were heard was quickly and effectively choked by neglect. In the course of this synthetic legal circus of vengeance and political biology were launched all the bothersome ideas which refused to be buried with the executed "war criminals" who were disposed of at its conclusion.[6] They are returned again and again and again, to use the words of Franklin D. Roosevelt, are being tossed around today, and are likely to be present at every other war that will ever be fought.

A hasty murder of various numbers of the defeated enemy in 1945-47 for the commission of acts which in reality are universal to all parties to a war would have been in harmony with what has been going on for several thousand years, and probably would have been quickly forgotten thereafter. There were quite a few voices raised in favor of this procedure in those days.[7] The ineradicable

[6]The "war crimes" trials were conducted on their part by the American prosecutors with the smug self-righteousness which has become the hallmark of American conduct of foreign affairs as hypocrisy has long been that of the British. Undoubtedly, the spirit of this adventure is more fully reflected in the companion to the trials, the abortive "denazification" policy of 1945-1948, about the most spectacular failure in the field of synthetic social revolution ever undertaken by one regime in the land of another. "Nothing but the spirit of hatred and revenge can explain our exaggerated, self-defeating zeal," declared Max Rheinstein, the Max Pam professor of corporate law at the University of Chicago, early in 1947. Prof. Rheinstein took part in this operation as part of American Military Government from the fall of 1945 to the spring of 1947. Rheinstein, "The Ghost of the Morgenthau Plan," *Christian Century* (April 2, 1947), pp. 428-430.

[7]There were scores of suggestions for mass executions of Germans, in particular, upon the successful conclusion of hostilities, between 1940 and 1945. The ardent Stalinophile Alexander Werth, in his book *Moscow War Diary* (1942), cited S. A. Lozovsky, Soviet vice-commissar for foreign affairs, as favoring killing 300,000 opponents upon capture, and there were several other prominent Soviet proposals of this sort, down to Stalin's recommendation that the top 50,000 officers of the German army be so dispatched. But the proposals were not confined to Soviet functionaries. All manner of persons of far milder cast and persuasion had ferocious solutions. Even the relatively detached Friedrich A. Hayek in 1945 called for mass killings. "Neither legal scruples nor a false humanitarianism should prevent the meting out of full justice to the guilty individuals of Germany," Hayek called out. "There are thousands, probably tens of thousands, who fully deserve death. All the Allies need to do is to decide how many they are prepared to put to death." Hayek, "A Plan for the Future of Germany," *Saturday Review of Literature* (June 23, 1945), pp. 39-40.

mistake was the adorning of this ceremonial blood-letting with the trappings of law, attempting to convince the world that a new era of high moral and ethical standards would henceforth prevail as a consequence of the benignant consequences which would surely flow from it, and become the cornerstone of new "law." One needs to know but a precious little bit of what has happened in the last twenty years to realize how staggeringly wrong such yearnings and predictions turned out to be. Were they alive in our time, Gilbert and Sullivan might easily have composed a shattering theatrical spoof of the whole sorry episode, but perhaps would have desisted from the effort because of the macabre nature of it all. The nearest thing one can find comparable to what they might have done is suggested by Charles Duff's sardonic commentary on Nuremberg in his trenchant *A Handbook on Hanging*.

Even if the pleas of the protagonists of the "war crimes" trials, that they wished to make new law applicable to subsequent wars, were to be taken seriously, there is no escaping that their making these laws retroactive to cover the war just fought was naked ex post facto, and all the sly word games and juridical nit-picking and the superbly skilled evasiveness of the international law barristers from that time to this have not succeeded in dismissing or obscuring this fact.

(One need not comment on the spectacle of this *ad hoc* "court" purporting to be a lawmaking body at the same time it was engaged in trying persons for having violated the very "laws" it was still fabricating. For all the vaunted belief in the "democracies" in the "separation of powers" dictum, the growing accommodation to judge-made law is a reality, but there surely must be a remarkable stretching of the imagination in order to get this offensive combination of tribal vengeance, Soviet legal and juridical practice, and retroactive decree in under the tent of international "law." Rather than succeeding in "charting bold new directions" and making new "law," and getting the succeeding circumstances and adaptation to this "law" described as "custom," the "war crimes" court mainly succeeded in constructing a terrifying blind alley, and the difficulty of backing out of it should become more evident as time goes by.)

Under the inept direction of Justice Robert H. Jackson, the Nuremberg process inscribed as criminal acts certain deeds which were not criminal acts at the time they took place, and the pious effort to gather them under the tent of such declarations of intention as the Briand-Kellogg Pact of 1928 in order to validate them and make them binding was about the most unconvincing caper of the whole affair. (This pact, which found various leaders of political regimes in the world offering to desist from making recourse to war as an instrument of national policy, except if attacked, has been rightly described as an agreement not to raise umbrellas unless it rained.) The painful attempt of Justice Jackson to make a case against the arraigned German military and political personalities was about as distressing an exhibition as the entire gathering witnessed, and even his ardent supporters in the journalistic contingent in attendance had to admit that he was eminently unimpressive, in addition to being incredibly outclassed and deflated by one of the defendants, Hermann Goering.[8] The trials in the Pacific were a veritable burlesque compared to their relatively dignified German counterparts.[9]

[8]Janet Flanner, who covered the trial for the *New Yorker* under the pseudonym "Genêt," cabled home on March 22, 1946, ". . . in that extremely important Göring-Jackson duel, it was, unhappily, Prosecutor Jackson who lost. . . . There had been no 'battle of ideas,' because Jackson seemed not to be able to think of any." "Letter from Nuremberg," *New Yorker* (March 30, 1946), p. 76. *Fortune* (December, 1946, p. 121) commented that Goering "handled Mr. Jackson during cross-examination like a fiend playing with a well-intentioned lad." No organ of the U.S. press was more chagrined at Goering's suicide than *Time*, which lamented that his act of evading hanging at Nuremberg managed "virtually to destroy the positive psychological effect of the Nuremberg trial," and successfully "wiped away ten months of painstaking work." *Time* (October 28, 1946), p. 35. But *Time* had acknowledged months before Goering's suicide that the work of the trial had been unsuccessful; in a comment on Jackson's closing statement at Nuremberg, in which he pointedly avoided restating "the trial's moral and legal basis," it admitted, "The world public would be content to see the Nürnberg criminals die, but it had not got around to distinguishing between criminal and legal war," and that until "a considerable part of it did that," the convictions "would be a function of victory rather than of law." This was a roundabout way of admitting that though the war actions of the defendants had not been successfully established as crimes, nevertheless it was meet that they die because the world propaganda campaign which had preconvicted them prior to trial had become too ponderous to defy at this stage. "Trial by Victory," *Time* (August 5, 1946), p. 31.

[9]There was usually a private and little-publicized mortification of prominent World War Two "war criminals" prior to the public spectacle. The least known perhaps was that of the Japanese premier, General Hideki Tojo, partially due to its peculiarly scandalous nature. It is best described by Captain P. J. Searles, USN (ret.), in his review of Clark Lee's *One Last Look Around* (New York: Duell, Sloane and Pearce, 1946) in the *New York Herald Tribune Weekly Book Review*, June 8, 1947, p. 9: "One of the most shockingly brutal episodes in journalism is revealed in Clark Lee's new book without any indication that the author or his colleagues felt the slightest bit of shame as participants. A few days after the occupation of Japan, Mr. Lee, with a fellow correspondent, Harry Brundidge, located General Tojo in Tokyo and had what was probably

It undoubtedly is extremely unnerving and disheartening for the parents of young Americans taken prisoner by the Communists in Viet Nam to hear them described as "war criminals" and threatened with trial and summary execution. Scores of angry newspaper editorialists have fulminated at such ominous proceedings as "farces," and indeed they are. Nevertheless, they are in close harmony with Communist concepts of group and ceremonial guilt, without any necessity to provide for individual protections nor encumbered by the principle of presumption of innocence unless and until proven otherwise. In this sense, the "war crimes" trials following the end of the Second World War also were the sophisticated offspring of the celebrated Moscow purge show trials of 1936-1938, though a thorough discussion of this aspect would be long and involved. But the silence of the country's major newspapers on the ancestry of these "war crimes" and the twisted verbiage and reasoning they have left us as a heritage has been as deafening as the barking and yelling over the most recent turn of events. Of the major papers, only the Chicago *Tribune,* which attacked the whole "war crimes" business twenty years ago and has never changed its position since, has been dealing with the current situation in a historical fashion, and acquainting readers who have come of age since those times with something of what prevailed when the whole episode had its inception.[10]

If the "war crimes" trials of 1945-47 and after were intended as object lessons to the world and designed to serve as a curb on warlike propensities by demonstrating the fate of "war criminals,"

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the first American postwar interview with Japan's No. 1 criminal [sic], a relaxed, rather genial chat. The following day the pair, plus half a dozen other newspapermen, tipped off that our Army authorities were going to arrest Tojo, hustled off to the general's home to cover the story. American troops arrived an hour or so later, demanded entrance and were met by the shot which was Tojo's attempt to suicide.

"Then came the disgraceful affair. Reporters and photographers crowded into the room where Tojo lay wounded, laughing, smoking, cheered by a sensational story. They jeered at the general, called him almost unprintable names, screamed at him for statements and pictures, stole his belongings, intimated he was a homosexual, complained that he took too long to die, and, as the author discreetly hints, even attempted to assist him out of the world for the sake of a more exciting news dispatch. This is not a reviewer's nightmare but a plain statement of what is set down in black and white to the dishonor of those who were present." Though Captain Searles was as inclined to preconviction of "war criminals" as the next person, his fundamental decency and honorableness certainly stand out prominently in this instance.

[10]One of the best of the more recent editorial summarizations of the subject by the *Tribune* was the September 30, 1965 "War of No Quarter."

then they are a miscalculation of dizzying dimensions. The world has known nothing but wars, civil and otherwise, ever since. But none of them has been fought to a unilateral conclusion, nor have any of them been allowed to spread beyond local regions. The lesson is still bright and fresh before all military leaders and "statesmen." Nuremberg, Tokyo, and Manila did not outlaw war or establish new international law; they made *losing* a war a crime and stipulated the new look in neckwear for the losing military leaders and "statesmen": a tidy piece of sturdy hemp rope. For that reason, it is likely that it will be in the interests of such people in the future to keep their wars small, localized, and inconclusive, and in particular avoiding such counsels of insanity as "unconditional surrender" policies. The alternative to this is a war fought with unprecedented savagery and lacking in the employment of no weapon, no matter how destructive, if thereby defeat may be avoided, since the lives of all the prominent losers are forfeit anyway under the doctrine of "war crimes."

In the light of this, the behavior of the Viet Cong is pointless, and simply an incitation to reprisals against their own prisoners in the hands of their enemy. Each side lacks possession of prominent figures from the opposition, as was also the case during the Korean War (1950-1953), when both sides there also went through the motions of assembling lists of "war criminals." Regardless how far these mutual murders of each other's captives go on, they will be simply sordid and vulgar killing bees and a retreat morally to a point in time at least before that of Ashurbanipal, if not to that before Bronze Age man.

There is much evidence that a goodly number in this country in particular would like to forget all about "war crimes" and "war criminals." But it does not appear that the Communists, who seem to have introduced both these political epithets, intend to let them do it, since there is still a considerable amount of political mileage remaining in them.

After all, joint supervision of World War II German "war criminals" is about the only political enterprise in which this country participates today in full cooperation with the Soviets: the management of the huge Spandau prison in Berlin, where three Germans convicted but not hanged in 1946 constitute the entire incarcerated community, run at an annual cost in recent years of at least a quarter of a million dollars. But far more important than that, the world

political structure, West and East, for twenty years, has rested on the "war crimes" trials of Nuremberg, Manila, and Tokyo. It is not possible to raise one's voice too high over the basic fundamentals of the "war criminal" idea without creating a stupendous political problem. Russian and Asian communism, the principal victors in the Second World War, are likely to be the major gainers from any bedrock re-examination of the War Criminal Follies of 1945-1947.

From time to time, various elements at home and abroad have tried to make political capital out of Nuremberg. One of the most vicious allegations which has resurfaced on many occasions has attempted to tie in criticism of the trials with persons of "conservative" political persuasion, ignoring the broad spectrum of the critics' personal political affiliations. But there is no denying the forthright and blunt denunciation of Nuremberg and all its works by the very liberal Associate Justice of the United States Supreme Court, William O. Douglas. In a book written less than a decade after the hanging of the German defendants, Justice Douglas put the legal objection to the proceedings in a minimum of words:[11]

> No matter how many books are written or briefs filed, no matter how finely the lawyers analyze it, the crime for which the Nazis were tried had never been formalized as a crime with the definitiveness required by our legal standards . . . , nor outlawed with a death penalty by the international community. By our standards the crime arose under an *ex post facto* law. . . . Their guilt did not justify us in substituting power for principle.

[11]Douglas, "The Nuremberg Trials," in *An Almanac of Liberty* (New York: Doubleday, 1954), p. 96.

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